No. 11,821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES, *Plaintiff,*

vs.

PAUL T. MARKEY, et al., *Defendants.*

DAWSON COUNTY, MONTANA, *Appellant,*

vs.

MARY HAGAN, E. B. CLARK, and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, and UNITED STATES OF AMERICA, *Appellees,*

and

MARY HAGAN, E. B. CLARK, and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, *Appellants,*

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE, his wife, and RUTH PETTERSON and HANS PETTERSON, her husband, THE SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED, UNITED STATES OF AMERICA, DAWSON COUNTY and PRAIRIE COUNTY, *Appellees.*

Upon Appeals from the District Court of the United States for the District of Montana.

BRIEF FOR APPELLEES (Bondholders).

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STATEMENT OF THE CASE.

The statement of appellant is controverted.

It is unfounded on the record and confusing. It is necessary a full statement be made.

The United States of America commenced this action to condemn 5,788.21 acres in Dawson and Prairie Counties, Montana. All of the lands involved were in the Upper Glendive-Fallon Irrigation District and the defendants Mary Hagan, E. B. Clark, Minnie R. Evans and other defendants were joined "as lien claimants of the holders of bonds issued" by the said District.

The complaint was filed pursuant to 40 U.S.C.A. 258a with declaration of taking and deposit in the registry of the Court of the estimated value of the lands and immediate possession (Tr. 2-28) was demanded.

The appellees on their own behalf and *on behalf of all other bondholders* of the District filed answer, counterclaim and cross-claim. (Tr. 28-43.)

The appellant county filed answer and petition for distribution. (Tr. 43-64.)

Both answers admitted the allegations of the plaintiff and the necessity of condemnation. (Bondholders Tr. 30 and County Tr. 43.)

Separate tracts and division of the lands according to ownership were outlined in the amended complaint (Tr. 5), answer of the county (Tr. 44), the Commissioner's appraisement (Tr. 69) and in the final judgment in condemnation. (Tr. 78-82.)

Dawson County acquired tax deeds to nearly all of the lands involved on December 11, 1939 (Tr. 97), and the county appraised the various tracts and directed sale and provided:

> "And all the above lands described as being in township 13 are *subject to the lien of the unpaid balance of certain Bonds issued by the Upper-Glendive-Fallon Irrigation District, Jan. 1, 1923.*" (Tr. 52-53.)

The notice of sale of the tax title property contained like provision (Tr. 55), for protection of bondholders.

Uncompleted option or negotiations to the United States were also shown in the answer of the county. (Tr. 59-64.)

No question has arisen regarding the creation or organization of the Irrigation District or the validity or liens of the bonds issued. (See Bondholder's Original Exhibit No. 3.) The tax deeds merged the assessments.

The map or plat of the District is original exhibit No. 3 and shows the location and boundaries and the two lifts or elevations, and all lands involved are within the District.

The Irrigation District was established by judgment dated December 20, 1920. (Abstract Bondholders' Original Exhibit No. 3, pages 20 to 23.)

The bonds in question were authorized by judgment of the District Court confirming the issue, made and entered December 2, 1922; $150,000.00 in bonds were authorized but only $81,500 sold

> "For the purpose of providing funds for the construction of a system of irrigation works for said District including the purchase of a pumping plant and certain coal lands, all in accordance with the Plan of Reclamation for the District approved and adopted by the Public Service Commission of Montana"

and the Court confirmed the bond issue

> "and the special tax or assessment levied to pay the said bonds and interest".
>
> (See Abstract Original Bondholders' Exhibit No. 3, pages 29-41.)

While this action was pending on July 11, 1944 (Tr. 67), before the appraisement filed October 1, 1945 (Tr. 69-77) and prior to judgment in condemnation, December 5, 1945 (Tr. 78-90) the Court ordered paid to the appellant Dawson County from the registry of the Court $10,628.57, being all of the general taxes set forth in the answer of Dawson County (Tr. 44-49), excepting redemption had been made as to Tract 494-14A (Tr. 67, 82, 86), and the general taxes thereon of $249.68 were not claimed by the county.

The assessments levied for the District up to 1938 and included in the tax deeds appear in the answer of the county (Tr. 44-49) and in the *ex parte order* of partial distribution on general taxes *obtained by the county* as *"delinquent, unpaid assessments made and unpaid on account of" said district amounting to $41,662.98.*

The District Court (Tr. 100) ruled as to the Yale Tract No. 1-27:

> "it does not appear that it was susceptible of irrigation, was ever assessed for that purpose, or that it was obtained from either of the counties, or that the irrigation district or bondholders have any lien upon the compensation of $758 deposited in the registry of the court to the credit of this piece of land."

The tract is described in the complaint (Tr. 8) in the appraisement of the Commissioners (Tr. 76) and the judgment of condemnation (Tr. 82, 86). The large map, Exhibit No. 3, shows that land within the boundaries of the District, and it is described in the judgment creating the District. (Bondholders' Original Exhibit No. 3, Abstract at page 22.) It was never excluded or withdrawn from the District. The petition for creation of the District, Bondholders' Original Exhibit No. 3, page 3, shows that the west half of Section 16 Township 13 north, range 53 EMPM, was assessed to Fred Yale, one of the petitioners creating the District. He sought to withdraw his name from the petition, same Exhibit at page 19, but notwithstanding the land was included, same Exhibit at page 22, and he was appointed one of the District Commissioners, same Exhibit at page 23, and he signed petition for issuance of the bonds in question, same Exhibit at pages 29 and 30, and as president presented the resolution for the issuance of the bonds, same Exhibit pages 31 and 36.

The District Judge also held:

> "The land designated as the Scottish-American Mortgage Co. tract, Nos. 1-47, and 1-53, for which

> $425 was deposited in the registry, does not appear to have been legally embraced in the irrigation district in the absence of notice or consent, and that upon foreclosure in which the irrigation district was included as a party defendant, no claim of lien or otherwise was made by such defendant. The irrigation district and the bondholders do not appear to have any interest in the distribution of this fund." (Tr. 100.)

The lands described as tracts Nos. 1-47 and 1-53 were described in the amended complaint as:

> "Lot Four (4) and the Northeast quarter of the Northeast Quarter (NE¼NE¼) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana." (Tr. 9.)

The large map, Original Exhibit No. 3, shows the lands within the boundaries of the District and also in Bondholders' Original Exhibit No. 3 at page 3, in petition to organize the District, and Mary E. Lewis was the owner of the property according to the last previous assessment rolls of Dawson County. She made an appearance and protested the inclusion of said lands in the District, same Exhibit at page 15, and also appeared through her attorney at the hearing, same Exhibit at page 20, but the Court ordered the District created after considering the evidence including the report of the State Engineer and adjudged that the lands were susceptible of irrigation from the same general source and the same system and included said land within the District. Same Ex-

hibit at page 22. No appeal was perfected from said judgment.

Dawson County on July 11, 1944, received full payment of its general taxes (Tr. 67) but in this appeal claims all of the compensation and seeks to deprive the bondholders, as lien claimants, of any portion thereof.

The preliminary order of distribution (Tr. 67) paid Dawson County $3315.06 (Tr. 108) in excess of the final appraisement (Tr. 69) and final judgment. (Tr. 78.)

The Court ordered refund under Section 258a from the Counties and directed judgment against the United States. Interest is due from at least July 11, 1944.

The final question on the appeal involves the matter of attorney's fees. Mary Hagan, E. B. Clark and Minnie R. Evans are acting not only on their own behalf but also on behalf of all the bondholders of the district (Tr. 28) and their attorneys through their services protected the funds which may be paid to all the bondholders pro rata and they requested an order for reasonable fees payable out of such funds (Tr. 40) but the District Court denied compensation. (Tr. 106.)

SPECIFICATIONS OF ERROR

(Under Cross-Appeal).

1. Yale tract No. 1-27 improperly excluded from irrigation district and deprived bondholders of $758. (Tr. 100.)

2. Scottish American Mortgage Co., Ltd., tract Nos. 1-47 and 1-53 improperly excluded from irrigation district and bondholders deprived of $425. (Tr. 100.)

3. District Court erred in not including interest on over-payment or improper withdrawal from deposit per order of July 11, 1944. (Tr. 108.)

4. Court erred in denying fees under equity rule to attorneys representing bondholders to be paid out of common fund protected for all and before distribution. (Tr. 106.)

ARGUMENT.

I.

APPELLANT'S THEORY.

The specification of errors and argument of appellant confines the issue:

1. The county claims it owned the lands involved and that the bondholders have no rights therein or to the proceeds on distribution under 258a, and

2. There was no overpayment and the condemnation proceedings should not have made division into tracts.

It is impossible to follow the argument or conflicting theories of the appellant because on one hand it attempts to claim a sale to the Government and maintains Section 258a does not apply (Appellant's Brief 14) even though the answer of county admitted all the allegations of the government's complaint on condemnation (Tr. 43) and paragraph 2 of the answer alleged that the lands upon which tax deeds were obtained by Dawson County included taxes,

> "levied by the State of Montana, Dawson County, Montana, and school districts, and taxes levied by Upper Glendive-Fallon Irrigation District"

The amount of the general taxes and likewise the irrigation taxes of the district are separately set forth in the answer (Tr. 44-49) and they are set forth more in detail in Original Exhibit No. 1.

Under no theory could the county levy assessments for the irrigation district and by reason thereof enforce same through the tax deeds and now question or attempt to repudiate such assessments which were the very foundation of the tax deeds.

It would serve no purpose in this condemnation proceeding to raise any question as to the validity of the tax proceedings which were doubtful. The government obtains the entire title to the land and the county obtains the general taxes from the deposit.

The county was given preference on the general taxes and early in proceedings obtained order for payment. (Tr. 67.)

The county appeals herein to *prevent the bondholders receiving any part of the compensation.*

The priority of general taxes is conceded and hence it is a waste of time to consider the many cases cited by appellant on that point.

The county acted for the district in the levy and collection of taxes. Its present attempt to take *all* the compensation on condemnation is the first and only *hostile* act of the county as against the bondholders. It is admitted by answer of the county and even appellant's brief on page 4 that the assessments for the district were levied and included in taking tax deeds.

II.

APPELLANT'S CITATIONS.

Chap. 100, Montana Session Laws 1943, (p. 8 of brief) limiting the time to attack the validity of a tax deed cannot apply to the public corporation whose taxes or assessments were the basis for the deeds.

The case of *Jensen Livestock Co. v. Custer County, et al.,* 113 Mont. 285, 124 Pac. (2d) 1013, was by private owner to redeem from tax deed and *Hartman v. Mimmack,* 154 Pac. (2d) 279, merely involved assessments for special improvements prior to tax deed BUT held that under Chapter 63 of Laws of 1937 assessments levied or payable after such deed "constitute a lien against the property".

The decisions cited by the appellant are clearly not in point. *In Re Third Street,* 177 Minn. 146, 225 N. W. 86, 74 A. L. R. 561, involves city charter provisions of St. Paul regarding condemnation.

State ex rel. St. Louis v. Beck, 330 Mo. 1118, 63 S. W. (2d) 814, 92 A. L. R. 373, pertains to the question of damages due to delay in condemnation.

Weeks v. Grace, 194 Mass. 296, 80 N. E. 220, 9 L. R. A. (N. S.) 1092, involved the question of whether a covenant or warranty in a deed against encumbrances protects the sovereign power under condemnation.

Gassoway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, is a limited decision and it was held that it was not necessary to make the county a party defendant on condemnation brought by the city. It was also held that the city having taken the full title the county had nothing to sell under tax proceedings.

Duckett v. U. S., 266 U. S. 149, 69 L. ed. 216, 45 Sup. Ct. 38, was a claim brought against the United States for the value of claimant's interest under lease in the Bush Terminal taken by the President and the Secretary of War for war purposes and the question simply involved the implied duty of the government to make compensation for the value of the lease.

Collector of Taxes v. Revere Bldg., 276 Mass. 576, 177 N. E. 577, 79 A. L. R. 112, involved purely a local question on the collection of taxes.

As explained in the case of *Gassoway v. Seattle,* supra, after condemnation there is no tax and as further explained in *U. S. v. Pierce County,* 193 Fed. 529, the inquiry is always directed to the question of whether the taxes were imposed before or after the acquisition of the property.

Other cases cited by appellant are *Lyeth v. Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. ed. 119, 119 A. L. R. 410, which involved income and gift taxes, and *U. S. v. Miller,* 317 U. S. 369, 63 S. Ct. 276, 87 L. ed. 336, 147 A. L. R. 55, as to severance damages.

III.

RIGHTS UNDER IRRIGATION DISTRICTS.

The appellant not having done so it is necessary to refer to the Montana law regarding irrigation districts, and the rights of bondholders thereunder.

The present Montana law on irrigation districts is found in Section 7166 to 7264.18 of the Revised Codes of 1935. However, the law in force, with some exceptions, at the time of the issuance of the bonds would be found within 7166 and 7264 of the Revised Codes of Montana 1921. Judgment creating district was made December 2, 1920.

Evidence of ownership on petition creating the district under Section 7166 of the 1921 Code was the county assessment roll of the preceding year and that section has since been amended to now require the

consent of a mortgagee on the petition. The history of the law is given in *Toole County Irr. Dist. v. State,* 104 Mont. 420, 67 Pac. (2d) 989. The consent provision as to mortgagee was first enacted as part of Ch. 112, Laws 1925, which was apparently overlooked by the District Judge in passing on tracts 1-47 and 1-53. Exclusive jurisdiction and powers are conferred upon the state District Court and wide discretion is lodged in the Court which hears and determines the issues and then makes findings and order creating the district, if proper. The law directed the Court should not exclude any lands susceptible of irrigation from the same source and system nor include any lands "which shall not in the judgment of the Court, be benefited by irrigation by means of said system of works" and also declared the finding and order of the Court *"shall be conclusive"* and assented to unless appealed to the Supreme Court within 60 days.

The law declared the district a public corporation for public welfare and the lands in the district to constitute the assessable property of the district. (Section 7169, 1921 Code.) Having come into existence the next step was to provide for irrigation which required funds obtainable only through sale of bonds to be issued as directed by Sections 7208 to 7231, 1921 Code. The steps required included a petition of a majority in acreage and number of owners of land in district, a resolution of the commissioners and petition, notice of hearing and judgment of confirmation by the state district court. Such proceeding is in

"rem". The plan or purpose must be set forth and the Court is given power to determine if the law has been complied with and notice given and likewise determine the validity of the bonds and the levy of the assessments to pay same and from the judgment an appeal is allowed but if not taken or if affirmed the judgment "shall be forever conclusive upon all the world as to the validity of said bonds and said special tax or assessment." (Section 7211, 1921 Code.)

No appeal was taken. The bonds are negotiable and were designated as 10-30 year serial bonds and were to be paid out of a special assessment "which constitutes a first and prior lien on all the real estate now, or at any time during the life of this bond, included in the said" district. Each bond recited the purpose for which it was issued being the construction of irrigation work and the purchase of a pumping plant and coal lands all as approved by the Public Service Commission of Montana and referred to the resolution of the Board of Directors of the district and the petition of the majority in number and acreage of the holders of title to the lands in the district and the decree of the District Court approving the legality and confirming the validity of all proceedings relative thereto and the levying of a special tax for payment and contained the certificate that all acts, conditions and things required by the constitution and laws of Montana to be done have been done and do exist and that provision has been made for the levy of a special tax upon all the real estate within the district sufficient to meet payment of the bonds.

The bonds were signed by the president and secretary of the district and were registered by the county treasurer and had attached the certificate of the Public Service Commission of Montana that they were legally issued and a public investment, and attached thereto is a copy of the resolution of the board certifying to the agreement that in each and every year all lands within the district would be subject to a levy of a tax or assessment sufficient to discharge the bonds at their maturity and interest. (Bondholders Original Exhibit No. 3 at pages 33 to 37.)

The list of the bondholders (Tr. 41) indicates the bonds were sold to the public, men and women, banks and estates over a wide territory. It is admitted by the county that all of the principal of the bonds remains unpaid. (Brief, page 3.) The bondholders claim, and it is not disputed, (Tr. 36) that the interest on the bonds has not been paid since January 1, 1927. Hence, 100% is due in principal and at least 120% in interest.

Montana has adopted the well established rule that we must construe the irrigation law as a whole.

Drake v. Schoregge, 85 Mont. 94, 277 Pac. 627. That case is also authority for the ruling that in the absence of allegation and proof of fraud, and none is claimed here, the district becomes absolute and if no appeal be taken from the judgment confirming the bonds they may not be questioned thereafter.

There the Court approved the similar ruling of the Circuit Court of Appeals for the Ninth Circuit being

Tomich v. Union Trust Co., 31 Fed. (2d) 515, which involved a Montana district. The plaintiff claimed that his lands were not benefited and it was held that the time to object was at the hearing when the district was formed and that subsequent determination or change of irrigable acreage shall not affect the lien of the bonds. In the *Drake* case under similar attack it was held that the authority to levy the assessments on the lands arose from the fact they were included in the district when formed and when the bonds were issued and were a part of the security pledged by the district for payment of the bonds:

> "The security may not be diminished. No change in the boundaries of the district as organized shall impair or effect its organization, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for which it was liable before such change."

Changes in the boundaries, extension or exclusion of lands, like the creation of the district require judicial action or due process under the law, but it is expressly provided that any change of the boundaries cannot impair nor affect any contract or lien. Section 7188.

Lien of Bonds.

Section 7213 of the 1921 Code, which is the same as the 1935 Code, expressly provided that all bonds issued

> "shall be a lien upon all the lands originally or at any time included in the district * * * and said special tax or assessment, shall constitute a

> first and prior lien on the land against which levied, *to the same extent and with like force and effect as taxes levied for state and county purposes.*"

In *Krueger v. Morris,* 110 Mont. 559, 107 Pac. (2d) 142, it was held:

> "Hence, at this late date, the bond issues must all be regarded as valid, and we must also treat the bonds as constituting liens upon the entire property of the district, since it is not alleged that any protest was made against the confirmation of the proceedings by the District Court under Section 7211."

Assessments; County Trustee.

Section 7232 to 7250, 1921 Code, provided "all bonds * * * shall be paid by revenue derived from a special tax or assessment levied as hereinafter provided upon all the lands included in the district" and the law made it the duty of the District Commissioners to provide for the annual levy sufficient to meet the interest and principal and Section 7234 provided that "all lands in each irrigation district * * * shall pay at the same rate for all purposes". The county treasurer is directed to collect the taxes and is made the custodian of the district funds. Sections 7239, 7240, 1921 Code.

Section 7243 of the 1921 Code provided that when land in the district be sold by the county treasurer for delinquent taxes and the assessments of the district form a part of the taxes for which sold the county treasurer shall place to the credit of the dis-

trict the assessments. And again under Section 7246 the duty was imposed upon the county commissioners to sell lands acquired by tax deeds within three months and pay to the district or the holders of certificates the full amount of taxes and assessments of the district.

The case of *State ex rel. Malott v. Board of County Commissioners,* 89 Mont. 37, 296 Pac. 1, was brought by the bondholders to compel the county to sell the lands in the district under the assumption that the liens of the assessments were equal or prior to the general taxes. The Court refused to so hold but did state in part:

> "The bonds are not an obligation of the district at all, but rather a charge against the lands within the district. The lien applies to the lands within the district. The district in its capacity as a public corporation, merely acts as the agency through which the assessments are levied and collected. * * *
>
> "When the county acquires these lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates. If the lands shall sell for an amount in excess of the taxes and assessments, then, after the payment of the general taxes, applying the well-established rules of equity, the remainder of

the money should be turned over to the irrigation district, provided that sum does not exceed the total amount which would have been assessed against these lands on account of the bonds, had such lands not been transferred by tax deed. Thus the bondholders will have received the full value of all of their security."

Again in *State ex rel. Malott v. Cascade County,* 94 Mont. 394, 22 Pac. (2d) 811, an attempt was made to prefer the debenture certificates, which the Court denied but did say in part:

"Summing up these statutes, it is seen that, upon the issuance of the debenture certificates, the irrigation district, or its vendee, is the owner of an interest in the land, which is never divested until the land is sold. * * * The County has no right, title or interest whatever in the debenture certificate. * * * When the lands are struck off to the county and the debenture certificates are issued *as required by the law* the county occupies the position of a trustee for the interested parties, including, of course, the bondholders."

The Court held that the county merely held the legal title and the irrigation district the equitable interest in the land to the extent of the assessments, and the Court further said:

"The county, as trustee, cannot lawfully do anything adverse to the rights of the bondholders, beneficiaries under the trust. After issuing the debenture certificate it can perform but two acts (or related acts) with respect to the lands: (1) Receive money paid upon redemption and distribute the same; (2) obtain a deed to the lands, sell

> the same, and distribute the money received upon the sale."

In that case it was also held:

> "It will be borne in mind that the state and the county, as well as the bondholders or the holders of the debenture certificates, have an interest in the land."

As argued in this case it was contended that the bondholders' only interest or right was to redeem the lands from the taxes but the Court in the last cited case held:

> "It is argued that the bondholders have the right to redeem the lands prior to the issuance of a deed by the county. Whether this be true or not, it does not furnish an adequate answer to the questions presented. If out of their pockets they provide the money to save the lands which are pledged to pay debts owing to them, they will reach but one end—the annulment of the tax sale. Redemption will not give them any title."

In 94 Mont. 394, at page 406, the Court affirmed the doctrine that when irrigation district lands are struck off to the county under the statute debenture certificates are issued and the county becomes a trustee, which trust is not discharged until the lands are redeemed or sold and the proceeds distributed "agreeably to equity".

Section 7243, 1921 Code, in force at the time of the issuance of the bonds and which is the same under the 1935 Code made it mandatory upon the county through its county treasurer, as its agent, to issue

debenture certificates showing interest of irrigation district, as follows:

> "the County treasurer of such county *must,* upon the issuance of the tax certificate of tax sale to said county, issue to said irrigation district, and in its corporate name, a debenture certificate for the amount of taxes and assessments due to said irrigation district from said lands and premises so sold, inclusive of the interest and penalty thereon, which certificate shall be evidence of and conclusive of the interest and claim of said irrigation district in, to, against, and upon the lands and premises so struck off to said county at such tax sale, and from and after the issuance of said certificate, the sum named therein and the taxes and assessments of said district evidenced thereby shall bear interest at the rate of one per centum per month from the date of said certificate until redeemed in the manner provided for by law for the redemption of the lands sold for delinquent state and county taxes, or until paid from the proceeds of the sale of the lands and premises described therein, in manner provided".

The county could only act through the county treasurer and, of necessity, the treasurer was agent for the county, *State ex rel. v. Bailey,* 99 Mont. 484, 44 Pac. (2d) 740. It would have been impossible for the bondholders scattered over the United States to have been at the elbow of the county treasurer and direct him in a ministerial matter wherein his duty was already prescribed by law and hence, the law presumes:

> "15. That official duty has been regularly performed."

and

"33. That the law has been obeyed."

See Section 10606, Revised Codes of 1935, and *Cavitt v. Seirson,* 175 P. (2d) 767.

Of course, the debenture certificates exist for the protection of the bondholders. The legal duty of the county treasurer followed without inquiry into or question of the facts. *State ex rel. Wolff v. Guerkind,* 109 P. (2d) 1094, 133 A. L. R. 304.

The case of *State ex rel. v. Rorabeck,* 111 Mont. 320, 108 Pac. (2d) 601, involved an irrigation district and held the principal and interest of the bonds were payable out of the particular fund in the custody of the county treasurer and that the officers of the district and the county treasurer "stand in the relation of trustees for the bondholders of the district", and it was there held that all the bonds must be paid pro rata from the special fund.

The property owners, the officers of the district and of the State of Montana issued these bonds and sold them to innocent persons with the express approval of the Court. No contention is made of fraud or lack of authority and the bonds contain recitals that should not be repudiated by the district, the county or even the Federal Court after 27 years. The rule of estoppel in a case of this kind is adopted in Montana:

Edmunds v. City of Glasgow, 89 Mont. 596, 300 Pac. 203, 86 A. L. R. 1052.

The law clearly sustains the bondholders' liens on all the lands in the district including the Yale Tract

1-27 where the amount due is $758 and the Scottish American Mortgage Co., Ltd., tract Nos. 1-47 and 1-53 where the amount due was $425.

It should not be necessary to extend this brief with citations supporting the bondholders' claim that the Court had no jurisdiction to change the boundaries of the irrigation district about 27 years after the establishment thereof to permit the two tracts last described to be excluded therefrom. We submit the judgment is wrong in that respect.

The Montana Legislature recognized the necessity of protecting bonds which were issued for special improvements including irrigation districts and the present law which protected the outstanding bonds in this irrigation district was enacted as Chap. 63, Laws of 1937. The tax deeds to the county were nearly all dated December 11, 1939, (Tr. 97) and hence the lands were subject to said Chapter 63 which reads in part:

> "Section 2215.9. Effect of deed. The deed hereafter issued * * * shall convey to the grantee the absolute title to the lands * * * except the lien for taxes * * * and the lien of any special, local improvement, irrigation and drainage assessments levied against the property payable after the execution of said deed."

The law and the agreement part of the bonds required annual assessments. After Dec. 11, 1939, the lien of the bonds required annual assessments. Such assessments continued or the right thereto existed even after the county had taken tax deeds. The bondholders

should not have been penalized because a public duty was not performed.

Hence, the bondholders should have collected the amount of the special assessments annually sufficient to pay the interest and retire the bonds.

See *Hartman v. Mimmack,* 154 P. (2d) 279.

Condemnation was the only means by which the government could have acquired title to the lands in the irrigation district.

Sale Not Option.

The answer of the county (Tr. 62) states the county commissioners were willing to option the county tax lands to the United States as of September 5, 1940, but in paragraph 1 of the answer the offer of the county is fixed at January 12, 1942 (Tr. 43) and in the appellant's brief, p. 1, the first date is used.

At any rate the law does not provide for an option. Chap. 198, Laws 1939 of Montana, directs public sale of tax lands within 6 months and if not sold the county commissioners may *sell* at not less than 90% of appraised value. No authority was given to the public officers to option such lands.

Chap. 171, Laws 1941, where a royalty in minerals of 6¼% was directed. The act requires the application of the proceeds to all tax funds, or to be pro rated.

In *School Dist. No. 12 v. Pondera Co.,* 89 Mont. 342, 297 P. 498, the rule was approved that even interest, penalties and costs must be apportioned among the taxing funds, unless the law provided otherwise.

Section 7243 of Code protects bondholders in irrigation districts. The irrigation district still exists. Its duty to the bondholders, except as modified or eliminated by condemnation, continues.

Validating Laws.

The Montana Legislature has protected the validity of the bonds by means of Section 7231.1 adopted in 1923 against attacks after one year as to the establishment of the district and the validity of the bonds.

Judith Basin Land Co. v. Fergus County, 50 F. (2d) 292;

State v. Board, 86 Mont. 595, 285 Pac. 932,

and the last decision contained the following apt statement:

> "The sovereignty of the state of Montana for public welfare has authorized the organization of irrigation districts in the state in aid of agricultural development; it has given recognition to them as municipal corporations, clothed them with authority to issue and sell bonds upon the faith and credit of the district for the purpose of obtaining requisite financial assistance, and assured investors in such bonds of their payment through the machinery of the law. Admittedly, the irrigation district has had the use and benefit of the money obtained on sale of the bonds for its purposes, and to now permit the board of county commissioners to frustrate their payment from the lands embraced in the district upon technical grounds, or because of alleged discretion vested in it, would work a manifest fraud and injustice upon innocent parties who have honestly and fairly parted with their money in reliance upon

the faith and credit of the irrigation district and the protection afforded by the laws of the state. Public municipalities should be held to the strictest accountability in payment of their obligations according to law, so as not to reflect discredit upon them or the state."

The Montana decisions are followed by the Federal Courts, see *Toole County Irrigation District v. Moody,* 125 Fed. (2d) 498.

Any lien against the property condemned must be satisfied out of the deposit, including tax and assessments:

State of Texas v. Moody's Estate, 156 F. (2d) 698;

U. S. v. 150.29 Acres, 135 F. (2d) 878;

U. S. v. 412,715 Acres, 60 F. Supp. 576;

U. S. v. 9.94 Acres, 51 F. Supp. 478.

The local or state law governs as to the rights and status of the parties making claim to the deposit.

Collector v. Ford Motor Co., 158 F. (2d) 354;

Swanson v. U. S., 156 F. (2d) 442.

IV.

JUDGMENT OF DISTRIBUTION.

Refund on Overpayment.

The judgment shows that the advance order of July 11, 1944, by mistake "evident and was easily made" Dawson County was paid or overpaid $3315.06 on tracts 494-8, 494-11 and 494-13. The Court corrected

same in the judgment and directed judgment against the United States and the county for refund.

The case of *U. S. v. Miller,* 87 L. Ed. 251 (advance) 63 S. Ct. 276, where it was held that the District Court retain jurisdiction and the Federal Government could collect on overpayment and that to hold otherwise would defeat the policy of the law and work injustice, holding:

> "'The District Court was dealing with money deposited in its chancery to be disbursed under its direction in connection with an action pending before it. The situation is like that in which litigants deposit money as security or to await the outcome of litigation. Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund but retained jurisdiction to deal with its retention or repayment as justice might require."

The judgment should be affirmed in that respect.

The judgment to which the bondholders are entitled includes:

Balance on deposit (allowed)	$19,034.89
Refund on overpayment (allowed)	3,642.92
(To which should be added interest at 6% per annum from at least July 11, 1944, date of overpayment to counties—Tr. 67)	
Yale Tract No. 1-27 (Court improperly excluded)	758.00
Scottish-American Mortgage Co. tract Nos. 1-47 and 1-53 (improperly excluded)	425.00

Nature of Condemnation.

The County seeks to avoid the irrigation laws of Montana and the rights of the bondholders by claiming that the title taken by the Government under condemnation is not a sale and in some manner wipes out the liens, interests and rights of the bondholders not only to the lands but also to the compensation paid which stands in place of the land. Here again the appellant confuses the theory in regard to the attempted offer or option of the County and the deposit of the Government in condemnation under Section 258a.

We refuse to consider any passing of title other than condemnation.

It is elementary that all property is subject to eminent domain.

29 *C. J. S.* page 852.

Here the allegations in the complaint are admitted by all parties. The government obtains "title to the said lands in fee simple absolute". The right to compensation shall vest in the persons entitled thereto, and distribution is made upon the application of the parties in interest. The statute reads:

> "The Court shall have power to make such orders in respect of incumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable." (40 USCA Sec. 258a.)

The rights under the irrigation law, the liens of the bonds, the trusteeship of the County and the waiver

of priority under Chapter 63 of the Laws of 1937 whereby the land condemned could be made subject to the payment of the bonds both as to principal and interest on future assessments all demonstrate the right of the bondholders to the protection of their liens and rights to assessments levied or to be levied, and hence, the District Court could not have done otherwise than protect the bondholders, and in the language of the Court:

> "The registry fund above described appears to be the only fund to which the bondholders may have recourse in this proceeding to apply on the bonded indebtedness of the district. Distribution to the bondholders apparently is required to be made on a pro rata basis. * * * The legal rights to distribution became fixed and are determinable as of the date the money was deposited in the registry of the Court". (Tr. 101.)

Interest.

The judgment on the refund should have given interest. The bondholders concede interest is not allowed on compensation paid into Court under Section 258a (40 USCA), but here $3642.92 the excess payments to the counties and withdrawn improperly on July 11, 1944, was not paid into Court and said section expressly provides that just compensation includes interest at the rate of 6% per annum as the value as of the date of taking. The judgment against the United States should include interest. (R. S. Sec. 966, Sec. 811, Judicial Code.)

V.

ATTORNEYS' FEES.

The learned District Judge kindly held that the services of Messrs. O'Neil and Leonard, representing the bondholders have inured to the benefit of all of them but declined to fix or allow them a fee out of the common fund.

We submit such fee is proper.

The equitable rule is that where a lawyer has rendered service for all of a class and made available a fund for all members of the class even though he appeared for one or a few it is proper that his compensation and expense should come from the entire common fund saved or protected for all and before it is distributed.

The Montana rule is outlined in

Hardware Mutual Casualty Co. v. Butler, 116 Mont. 73, 148 Pac. (2d) 563,

> "where, as here, one litigant has borne the burden and expense of successful litigation which has created and brought into court a fund in which others share with him, it is only just and equitable that those who share in the benefits should contribute to the payment for the services of the attorney whose labors resulted in the creating or preserving of such common fund. (Sears v. Inhabitants of Town of Nahant, 215 Mass. 234, 102 N.E. 491, Ann. Cas. 1914C, 1296)"

and

> "When the litigation resulted in a cash settlement, the attorney thereby earned the right to

participate in the fruits of his victory and to be compensated from the very moneys which his successful prosecution of the action made available."

See *U. S. v. Hudson,* 39 F. Supp. 797.

Each bondholder will share pro rata in the disbursement and it would be unjust for a few to carry on litigation for years under great expense and let others sit back and enjoy a free ride and have all the advantages without bearing any of the burden.

California follows the equity rule. See:

Wilson v. Harold G. Ferguson Corporation, 25 Cal. (2d) 274, 153 P. (2d) 714; and see *Annotations* in 107 A.L.R. 749,

where almost unlimited cases are cited to sustain the equitable rule. And under the heading "Suit by Bondholders" at page 759, it is said to be inequitable to permit bondholders to share in the benefits without contributing to the expense.

In view of the fact that the fees so paid are contingent, we submit 25% is a reasonable fee to allow the attorneys to be first paid out of the common fund to be distributed, and same should have been allowed.

CONCLUSION.

We submit the judgment of the District Court must be affirmed in so far as it,

a. Authorizes distribution to the bondholders of the irrigation district after the appellant county has been paid in full for general taxes; and

b. Authorizes judgment against the United States in favor of the bondholders for $3642.92 being the excess awards made to the counties for general taxes and paid through mistake. (Tr. 108.)

But the judgment should be reversed and corrected on cross-appeal, as to:

a. The Honorable District Court should not have attempted to change the boundaries of the irrigation district and excluded therefrom the Yale Tract No. 1-27 and thus deprive the bondholders of their lien thereon and the compensation paid to the extent of $758 and likewise the Court should not have attempted to change the boundaries of the irrigation district and exclude therefrom the Scottish-American Mortgage Co., Ltd., Tract Nos. 1-47 and 1-53 and deprive the bondholders of their lien thereon and the compensation paid to extent of $425.

b. Reasonable attorneys' fees should be awarded D. J. O'Neil and P. F. Leonard against the common fund preserved.

c. Interest at 6% per annum from July 11, 1944, should be allowed on the moneys paid in excess being $3,642.92.

Respectfully submitted,

D. J. O'Neil,

P. F. Leonard,

Attorneys for Appellees (Bondholders).